# National Labor Relations Board Weekly Summary of

## **NLRB** Cases

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Bryant Health Center, Inc. (9-CA-43747, 44012; 353 NLRB No. 80) Ironton, OH Jan. 30, 2009. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad no solicitation/no distribution rule; creating the impression that its employees' union activities were under surveillance; prohibiting employees from discussing salaries, wage increases, and performance evaluations with one another; maintaining an overly broad confidentiality rule when it instructed an employee not to discuss her discipline with others; and by terminating that employee. [HTML] [PDF]

The Board, in agreeing with the judge that the Respondent violated Section 8(a)(1) by terminating employee Christina Cox, found it unnecessary to pass on the judge's finding that the discharge also violated Section 8(a)(3), inasmuch as the additional finding would be cumulative and would not materially affect the remedy for the discharge. The Board also denied the General Counsel's request for compound interest computed on a quarterly basis for any backpay award, as it was unprepared at this time to deviate from its current practice of assessing simple interest.

(Chairman Liebman and Member Schaumber participated.)

Charges filed by Teamsters Local 92; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Ironton, March 4-6, 2008. Adm. Law Judge John T. Clark issued his decision Aug. 18, 2008.

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Cintas Corp. (4-CA-34160, et al.; 353 NLRB No. 81) Cincinnati, OH Jan. 30, 2009. In this case, the Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(3) of the Act by issuing warnings to several employees for wearing union stickers and hats. The Board also adopted the judge's findings that the Respondent violated Section 8(a)(1) by: telling one employee not to display a union hat in her work area; impliedly threatening to discharge that employee if she again wore a union hat or union sticker; directing an employee to put a union flier inside her wallet or pocketbook, take it home, and not show it to anybody; and confiscating union fliers in its break room. In the latter connection, the Board adopted the judge's finding that the Respondent had failed to effectively repudiate the unlawful confiscation. In addition, the Board adopted the judge's ruling to exclude evidence of the Union's nationwide, multivear campaign against the Respondent. [HTML] [PDF]

However, the Board reversed the judge's finding that the Regional Director (RD) for Region 4 had properly set aside a settlement agreement concerning an allegation that the Respondent had violated Section 8(a)(1) by calling the police in Charlotte, NC. Applying established precedent, the Board found that the newly alleged conduct on which the RD had relied to set aside the settlement agreement was not truly "postsettlement" conduct, as the General Counsel's agents were already investigating that conduct at the time when the Respondent was directed to comply with the settlement agreement. Accordingly, the Board dismissed the allegation that the Respondent violated Section 8(a)(1) by calling the Charlotte police.

The Board also reversed the judge and found that the Respondent violated Section 8(a)(1) by asking an employee to sign an affidavit stating that she had not sent any letters to the Respondent's customers. In doing so, the Board found it unnecessary to pass on the judge's findings that the Respondent (1) violated Section 8(a)(1) by asking that employee about her signature on a particular letter, and (2) did not violate Section 8(a)(1) by telling her to be careful because her signature was being forged.

(Chairman Liebman and Member Schaumber participated.)

Charges filed by UNITE HERE; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Hartford, March 13-15, 2006 and at Concord, March 27-31, and May 1-3, 2006. Adm. Law Judge Ira Sandron issued his decision Sept. 20, 2006.

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Coastal Cargo Co., Inc. (15-CA-18215; 353 NLRB No. 86) New Orleans, LA Jan. 30, 2009. The Board adopted the administrative law judge's findings and conclusion that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally increasing the wage rate of its unit employees, who are represented by Teamsters Local 270, without affording the Union notice and an opportunity to bargain. In so doing, the Board rejected the Respondent's defenses of waiver-by-inaction and economic exigency. Based on these findings and conclusion, the Board issued the judge's recommended order. [HTML] [PDF]

(Chairman Liebman and Member Schaumber participated.)

Charge filed by Teamsters Local 270; complaint alleged violation of Section 8(a)(1) and (5). Hearing at New Orleans on July 8, 2008. Adm. Law Judge Michael A. Marcionese issued his decision Sept. 29, 2008.

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Fluor Daniel, Inc. (15-CA-12544, et al.; 353 NLRB No. 79) Baton Rouge, LA Jan. 27, 2009. In an earlier proceeding, the Board found that the Respondent unlawfully refused to hire certain union-affiliated applicants, and ordered the Respondent to provide instatement and backpay to the discriminatees. 333 NLRB 427 (2001), enfd. 332 F.3d 961 (6<sup>th</sup> Cir. 2003). In the compliance proceeding, the administrative law judge specified that those remedies would be subject to the limitations established in Oil Capitol Sheet Metal, Inc., 349 NLRB No. 118 (2007). Subsequently, the Board granted the requests of several of the parties for special permission to appeal this ruling, as well as several related rulings by the judge, but denied the appeals on the merits, finding that the judge did not abuse his discretion and remanding the proceeding to the judge for further action consistent with the Board's decision. 353 NLRB No. 15 (2008). [HTML] [PDF]

In the present case, the Board denied the Charging Parties' motion for reconsideration, which asserted that the Board—in denying the parties' special appeals—(1) did not have statutory jurisdiction to rule on this case as a two-member Board; (2) erred in ruling that *Oil Capitol* should be applied in this case; (3) erred in failing to rule that *Oil Capitol* should not be applied retroactively in this case; and (4) erred in failing to find that *Oil Capitol* was wrongly decided. The Board noted that those issues were considered and rejected by the Board in denying the special appeals, and thus the motion for reconsideration did not establish extraordinary circumstances within the meaning of Section 102.48(d)(1) of the Board's Rules.

Chairman Liebman concurred in the denial of the motion for reconsideration for the reasons stated in footnotes 5 and 8 of the Board's Order denying the special appeals.

(Chairman Liebman and Member Schaumber participated.)

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Garner/Morrison, LLC and Carpenters Southwest Regional Council (28-CA-21311, 28-CB-6585; 353 NLRB No. 78) Tempe, AZ Jan. 27, 2009. The Board affirmed the administrative law judge's findings that the Respondent Employer did not violate Section 8(a)(1) of the Act during an April 2, 2007 meeting by: (1) making a statement of futility aimed at the Painters Union; (2) promising benefits to employees; (3) polling employees; and (4) interrogating the employees regarding their preference for representative. The Board additionally reversed the judge's findings that (1) the Respondent Employer did not violate Section 8(a)(1) by engaging in surveillance during an April 2, 2007 meeting; (2) the Respondent Employer did not violate Section 8(a)(2) by assisting and recognizing the Respondent Carpenters Union as the exclusive-bargaining representative of its painters and tapers; and (3) the Respondent Carpenters Union did not violate Section 8(b)(1)(A) by accepting such recognition. Finally, the Board remanded to the judge the issue of whether the Respondent Employer violated Section 8(a)(1) by interrogating employee Gary Servis. [HTML] [PDF]

(Chairman Liebman and Member Schaumber participated.)

Charges filed by Painters District Council 15, Local 86; complaint alleged violations of Section 8(a)(1) and (2) and Section 8(b)(1)(A). Hearing at Phoenix, Sept. 5-6, 2007. Adm. Law Judge James M. Kennedy issued his decision Dec. 21, 2007.

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*Narricot Industries, L.P.* (11-CA-21827, et al.; 353 NLRB No. 82) Boykins, VA and Murfreesboro, NC Jan. 30, 2009. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) of the Act by withdrawing recognition from the Union. [HTML] [PDF]

The Respondent withdrew recognition of the Union as bargaining representative of a two-facility unit of production and maintenance employees based solely on a decertification petition. The Board agreed with the judge that the Respondent provided unlawful assistance to the decertification effort, thus tainting the petition and therefore violating Section 8(a)(5) by withdrawing recognition. In so finding the Board relied only on the evidence discussed below.

After employee Henry Vaughn asked for information about how to remove the Union, Human Resource Manager Kris Potter prepared a decertification petition, gave it to Vaughn, employee Shirley Lewis, and to intern Anja Baumann directing them to return the signed petitions. Potter gave specific estimates of the number of signatures needed to both Vaughn and Baumann, and gave Baumann a list of unit employees. (Member Schaumber explicitly did not pass on whether the mere provision of an employee list to aid the collection of signatures on a decertification petition would constitute unlawful assistance.) When Baumann returned signed copies of the petition to Potter he expressed approval and told her that more signatures were needed. Supervisor Eric Hayes told employee Willie Mitchell that employees would receive a pay raise if the Union were decertified and that Mitchell could sign a copy of the petition in Hayes' office.

The Board rejected the Respondent's contention that the judge should have considered other evidence which it claimed showed that employees' disaffection with the Union began before the Respondent engaged in the unlawful conduct. The Board found that the evidence was of a type previously found to be insufficient to prove a union's loss of majority support, and noted that the Respondent did not rely on any of the evidence when it withdrew recognition.

The Board also concluded that *NLRB v. Mullican Lumber and Manufacturing Co.*, 535 F.3d 271 (4<sup>th</sup> Cir. 2008), which issued after the judge's decision here, did not require a different result.

(Chairman Liebman and Member Schaumber participated.)

Charges filed by Carpenters, Carpenters Industrial Council Local 2316; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Jackson, Feb. 26-28, 2008. Adm. Law Judge Margaret G. Brakebusch issued her decision May 6, 2008.

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Operating Engineers Local 324 (Hydro Excavating, LLC) (7-CB-15343; 353 NLRB No. 85) Marine City, MI Jan. 30, 2009. The Board adopted the administrative law judge's finding that the Respondent did not violate Section 8(b)(1)(A) of the Act by expelling Charging Party David Williamson from membership. Contrary to the judge, however, the Board also found that the Respondent did not violate Section 8(b)(1)(B) by expelling Williamson from membership and dismissed the complaint. In dismissing the 8(b)(1)(B) allegation, the Board concluded that Williamson was not an 8(b)(1)(B) representative at the time of the expulsion. [HTML] [PDF]

(Chairman Liebman and Member Schaumber participated.)

Charge filed by David Williamson, III, an individual; complaint alleged violation of Section 8(b)(1)(A) and 8(b)(1)(B). Hearing at Detroit on Aug. 29, 2007. Adm. Law Judge Michael A. Marcionese issued his decision Feb. 12, 2008.

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Post Tension of Nevada, Inc. (28-CA-21886; 353 NLRB No. 87) Phoenix, AZ Jan. 30, 2009. The Board adopted the administrative law judge's dismissal of allegations that the Respondent violated Section 8(a)(1) of the Act by: (1) threatening striking employees seeking reinstatement that they would be treated only as economic strikers and would be contacted when the Respondent had job openings; (2) threatening employees by informing them that it would be futile for them to engage in union or other concerted activities; (3) telling the unfair labor practice strikers seeking reinstatement that they were only at the Respondent's facility to cause problems or trouble; (4) threatening to physically harm employees because they engaged in union activity; and (5) interrogating employees about their union activity. The Board also adopted the judge's dismissal of the allegation that Leobardo Delgado's second strike, which began on April 10, 2008, was an unfair labor practice strike, and the Respondent's refusal to reinstate him after he made an unconditional offer to return to work constituted a violation of Section 8(a)(3). [HTML] [PDF]

(Chairman Liebman and Member Schaumber participated.)

Charge filed by Iron Workers District Council of the State of California and Vicinity; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Phoenix, Aug. 6-7, 2008. Adm. Law Judge Gregory Z. Meyerson issued his decision Oct. 28, 2008.

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Sheehy Enterprizes, Inc. (25-CA-30583; 353 NLRB No. 84) Indianapolis, IN Jan. 30, 2009. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to adhere to, and repudiating, the collective-bargaining agreement to which it agreed to be bound on May 21, 2004. [HTML] [PDF]

In finding the violation, the judge determined that the terms of the "Acceptance of Working Agreement" and the collective-bargaining agreement executed by the Respondent's owner, James Sheehy, were clear and unambiguous, and covered all of the Respondent's employees and work within the Union's jurisdiction. The judge thus refused to consider parol evidence, in the form of Sheehy's hearing testimony, that Sheehy believed, based on the Union's alleged misrepresentation regarding the scope of the agreement, that the agreement bound him only for a single project.

The Board found no merit in the Respondent's exceptions asserting that the judge erred in refusing to consider Sheehy's testimony because parol evidence is admissible in the event of fraud, mutual mistake, or duress. Stating that the Respondent's exception amounted to a defense that the contract is void because of "fraud in the execution," the Board found it unnecessary to resolve whether parol evidence is admissible under Board law to prove that defense. The Board found that even if Sheehy's testimony concerning the Union's alleged misrepresentation were considered and credited, the Respondent did not establish "fraud in the execution." The Board found that Sheehy's testimony did not establish that the Union misrepresented the agreement covered only a single project. In addition, the Board concluded that "fraud in the execution" had not been established because the Respondent had the opportunity to read and consider the agreement and the Union did not deprive the Respondent of the opportunity to ascertain the agreement's true nature. Alternatively, to the extent the Respondent argued that the agreement should be rescinded due to Sheehy's mistake in signing it. The Board rejected that defense because the Respondent had the opportunity to read the documents but did not do so. Member Schaumber also stated in a personal footnote that he found it unnecessary to pass on the Respondent's exception based on Section 10(b) as the Respondent did not timely raise that defense in either its Answer to the Complaint or at the hearing.

(Chairman Liebman and Member Schaumber participated.)

Charge filed by Laborers, State of Indiana District Council; complaint alleged violations of Section 8(a)(1) and (5). Hearing at Indianapolis on July 21, 2008. Adm. Law Judge Joel P. Biblowitz issued his decision Sept. 3, 2008.

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Triple A Fire Protection, Inc. (15-CA-11498; 353 NLRB No. 88) Semmes, AL Jan. 30, 2009. The Regional Director for Region 15 served the parties with a third amended compliance specification based on findings that the Respondent had violated Section 8(a)(1) and (5) of the Act. After the Respondent filed its answer to the specification, the Charging Party, joined in part by the General Counsel, filed a motion to strike portions of the Respondent's affirmative defenses and a motion for partial summary judgment. The Respondent opposed the Charging Party's motions in its response to the Notice to Show Cause, and filed a motion for summary judgment. [HTML] [PDF]

The Board granted the Charging Party's motion for partial summary judgment, granted in part and denied in part the Charging Party's motion to strike, and denied the Respondent's motion for summary judgment in full. In its motion for partial summary judgment, the Charging Party argued that the Respondent's answers to paragraphs 7-10 of the compliance specification, which concerned the calculation of backpay and payments to fringe benefit funds, were merely general denials and insufficient to refute gross backpay calculations. The Board agreed with the Charging Party, and further found that the Respondent's opposition to the motion did not cure the defects in the initial answers. Thus, the Board granted the motion for partial summary judgment. With respect to the Charging Party's motion to strike, the Board found that certain of the

Respondent's affirmative defenses raised matters litigated and decided in the underlying unfair labor practice proceeding, and barred the Respondent from raising those defenses in the compliance proceeding. The Board denied the Charging Party's motion to strike as to one defense covered by the Charging Party's motion, as that defense did not rely on previously litigated matters.

With respect to the Respondent's motion for summary judgment, the Board denied it in full, finding that the motion impermissibly relied, in part, on matters that had been litigated in the underlying unfair labor practice proceeding, and that the Respondent had otherwise failed to establish that there are no genuine issues of material fact in dispute and that it is entitled to summary judgment as a matter of law.

(Chairman Liebman and Member Schaumber participated.)

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White Oak Manor (11-CA-21786; 353 NLRB No. 83) Shelby, NC Jan. 30, 2009. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by interrogating and threatening employees Nichole Wright-Gore and Angela Hawkins and by discharging Wright-Gore. In agreeing with the judge that Wright-Gore's discharge was unlawful, the Board found that her photographing of other employees was part of the res gestae of her protected activity in attempting to compel the Respondent to fairly enforce its dress code. The Board also found that Wright-Gore's conduct was not sufficiently egregious to remove it from the protection of the Act. In so finding, the Board noted that the Respondent did not establish that it had disseminated or previously enforced a rule against such photography, and that, based on credited testimony, Wright-Gore did not take the photograph cited by the Respondent as the basis for her discharge. [HTML] [PDF]

(Chairman Liebman and Member Schaumber participated.)

Charge filed by Nichole Wright-Gore, an individual; complaint alleged violation of Section 8(a)(1). Hearing at Shelby, March 24-25, 2008. Adm. Law Judge Lawrence W. Cullen issued his decision Aug. 12, 2008.

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#### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

The Fremont-Rideout Health Group d/b/a Fremont Medical Center and Rideout Memorial Hospital (California Nurses Association) Marysville/Yuba City, CA Jan. 29, 2009. 20-CA-33521, et al.; JD(SF)-05-09; Judge John J. McCarrick.

*KLB Industries, Inc. d/b/a National Extrusion & Manufacturing Co.* (Auto Workers [UAW]) Bellefontaine, OH Jan. 30, 2009. 8-CA-37672, 37835; JD-05-09; Judge David I. Goldman.

### LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to Reports of Regional Directors or Hearing Officers)

## DECISION AND DIRECTION [that Regional Director open and count ballot]

St. Joseph Health Services of Rhode Island, Fatima Hospital, Providence, RI, 1-RC-22165, Jan. 29, 2009 (Chairman Liebman and Member Schaumber)

#### DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Bunge Oils, Inc., Fort Worth, TX, 16-RM-777, Jan. 29, 2009 (Chairman Liebman and Member Schaumber)

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(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

## DECISION, ORDER [setting aside election conducted on 10/3/08], AND DIRECTION OF SECOND ELECTION

Tendercare (Michigan) Inc., d/b/a Tendercare Healthcare Center of Frankenmuth, Frankenmuth, MI, 7-RD-3622, Jan. 30, 2009

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